IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC., AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC., AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Authors League of America, Inc., is an organization of professional writers and dramatists. One of its principal purposes is to express the views of its members in controversies involving rights of free press and free speech. Because the determination of this appeal may significantly affect those fundamental rights, The Authors League (with the consent of the parties) respectfully submits this brief.

ARGUMENT

I

We respectfully submit that the Petition should be granted because as Mr. Justice Brennan emphasized in *Jacobellis* v. *Ohio,* 378 U.S. 184:

> ". . . the question whether a particular work is obscene necessarily implicates an issue of constitu-

> tional law . . . Such an issue we think must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.'" (at p. 188).

In *Jacobellis,* Mr. Justice Brennan also said:

> ". . . Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." (at p. 190).

II

Petitioners were entitled to have each publication judged solely on the basis of its contents under the standards laid down by this Court. However, it would appear from the opinion of the Court of Appeals that other factors were considered and may have had some part in the judgment of the works involved. We submit that such other factors should not have been considered. The fact that the Petitioners were motivated by a desire to collect profits from their publications does not make the publications any more or less obscene (338 F. 2d 12, 15). Nor were they made any more or less obscene by the Petitioners' predilection for selecting unusual mailing addresses or by the standards which they used in choosing an editor (338 F. 2d at p. 13).

Consideration of these extraneous circumstances obviously increased the distaste with which the Court of Appeals viewed the Petitioners and their activities and may

to some extent have influenced its judgment on the sole question—whether the publications on trial were obscene under the standards laid down by this Court.

III

In *Jacobellis,* Mr. Justice Brennan said, ". . . a work cannot be proscribed unless it is 'utterly' without social importance" (378 U.S. at p. 191). It would appear that the petitioners' publications were judged by a much more restrictive standard than this. The Court of Appeals apparently felt that only "authentic artistic efforts that may incidentally have four letter words or nudity or sex as an integral part of the work" are in the category of works that have sufficient redeeming social importance in a case where obscenity is charged (338 F. 2d at p. 15). We respectfully submit that this test is contrary to the standards laid down by the Court in *Roth* and *Jacobellis.*

IV

We respectfully submit that any statute punishing the publication of books or magazines on the ground of "obscenity" is an unconstitutional restraint on the rights of free speech and press guaranteed by the First Amendment, and should be condemned for the reasons stated by Mr. Justice Douglas and Mr. Justice Black, dissenting in *Roth* v. *United States,* 354 U.S. 476, 508.

V

The possibility that an author or publisher can be tried and imprisoned for publishing "obscene" material is in it-

self a deterrent on the rights of free speech and press. The risk of trial, with its expense and other hardships, is a formidable deterrent (although the author or publisher may ultimately be rescued by this Court).

The deterrent effect of an obscenity statute is increased by the impossibility of determining where the line will be drawn. In *Jacobellis*, Mr. Justice Stewart said that "under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard core pornography," but he went on to say:

> "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." (378 U.S. at p. 197).

If members of the Court have this difficulty, and can be divided in their opinions as to what constitutes an obscene publication, the uncertainty for individual authors and publishers is even more difficult.

We respectfully submit that the restraint on free press of a criminal obscenity statute should at least be limited to situations in which a publisher has invaded the right of privacy of members of the public and forced obscene material on them, under circumstances where they have no opportunity to accept or reject it.

But, where a publisher distributes a book or magazine to readers who are free to decide whether they will accept it or reject it, read it or not read it, then, we submit, the Federal Government should not interfere with the right

of the publisher to publish or the reader to read. In these circumstances the "absolute" guarantees of the First Amendment can be and should be retained for the benefit of authors, publishers and readers.

Here, there is no evidence that petitioners forced their publications on defenseless readers. Advertisements, which were admittedly not obscene, were mailed to potential customers, but the publications themselves were only mailed to those who ordered them.

For these reasons, we respectfully submit that the Petition should be granted.

Respectfully submitted,

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